No. 14,906

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND PULP AND TIMBER CO., a corporation,

Appellant,

vs.

JOE A. O'REILLY,

Appellee.

JOE A. O'REILLY,

Cross-Appellant,

vs.

PUGET SOUND PULP AND TIMBER CO., a corporation,

Cross-Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S PETITION FOR REHEARING

EVANS, MCLAREN, LANE, POWELL & BEEKS
VAUGHN E. EVANS
MARTIN P. DETELS, JR.
Attorneys for Appellant and Cross-Appellee.

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Seattle 4, Washington

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CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF KING } ss.

MARTIN P. DETELS, JR., being first duly sworn upon oath, deposes and says that he is one of the attorneys for the appellant; that the within petition for rehearing is, in his judgment, well founded and is not interposed for delay.

Martin P. Detels Jr.

SUBSCRIBED AND SWORN to before me this 25 day of January, 1957.

M. L. Flynn

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

REASON ASSIGNED FOR REHEARING

This petition for rehearing is limited to that portion of this Court's opinion and decision which sustained the trial court's holding that the original agency agreement was not modified by an agreement for the reduction of O'Reilly's commission from 3% to 1½%, effective January 1, 1949.

The Court's opinion makes it clear (pp. 4-5) that it regarded the trial court's holding on this phase of the case as a determination of *fact,* and reviewed it as such.

This Court obviously felt its powers of review to be limited, indicating that it might reach a different conclusion if the question were one of law.

Appellant's position was and is that there was no dispute in the evidence on this point, and that the trial court's holding was one of law.

Where the evidence is not in dispute the legal consequences which flow from such evidence present a question of law and not of fact, and this Court has frequently ruled that it is free to draw its own conclusions in such a case.

In *Brown v. Cowden Livestock Co.,* 187 F (2d) 1015 (9th Cir., 1951) this Court was called upon to review a trial court judgment based upon conclusions as to the legal consequences of transactions on July 16, 1947, which conclusions were set forth in the trial court's Findings of Fact. This Court said:

"The findings of the District Judge in this regard are in effect findings as to the effect of these transactions rather than findings which resolve disputed facts. Hence we do not find ourselves obstructed by the traditional rule not to disturb findings of fact of the trial court. We are therefore free to make our own determination as to the legal conclusion to be drawn." (187 F. (2d) 1015, 1018)

Again, in *Stevenot v. Norberg,* 210 F. (2d) 615 (9th Cir., 1954) this Court said:

"When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions." (210 F. (2d) 615, 619)

ARGUMENT

There Are No Disputed Facts.

There was no conflict in the evidence relating to the reduction of O'Reilly's commission.

Two persons were present and participated in the critical conversation, the appellee, O'Reilly, and Roberg, appellant's vice-president.

It will be helpful here to review the testimony of each as to the substance of the conversation, together with the other evidence in the record bearing on that point.

O'Reilly testified on direct examination as follows:

"Q. Can you state now the substance of what you said to Mr. Roberg?

A. Well, I said to Mr. Roberg that the profits of the board division weren't very substantial and I said that as a temporary measure I would reduce the commission to one and one-half percent until the operations became profitable.

Q. Did Mr. Roberg say anything in response to that?

A. As I recall, Mr. Roberg said: 'That is a nice gesture.'

Q. By whom was the subject first raised?

A. It was raised by me." (Tr. 97)

On cross-examination, at Tr. 109, O'Reilly testified: "I voluntarily suggested a temporary reduction at that time, yes." At Tr. 144 he further testified on cross-examination:

"A. Well, I made the suggestion of taking a lesser amount for a period.

Q. A period that you did not stipulate?

A. That is right."

The only other evidence in the record bearing on O'Reilly's version of the conversation is contained in Exhibit A-1 and A-6. In A-1, O'Reilly's letter of July 12, 1951, he reiterates that at the time of the conversation he voluntarily reduced his commission from 3% to 1½%. (See Tr. 123-124). In A-6, written by O'Reilly on June 5, 1953, he stated as follows:

"You may recall that I voluntarily suggested that I take 1½% or half of the agreed amount starting January 1, 1949 *'until the operation became profitable.'*

"It is my considered opinion that your records, and/or an independent audit, will dis-

close the fact that the boardmill operation was profitable for the major portion, if not all, of the time since that date."

Roberg testified as follows:

"Mr. O'Reilly said he was going to voluntarily reduce his sales commission from three percent to one and one-half percent, and I asked him what prompted it, and he said he thought the business wasn't doing too well. I said: 'That is self evident.'" (Tr. 213)

There was also placed in evidence the substance of a memorandum from Mr. Roberg to Mr. Clayton Rogers, then Chief Accountant for appellant, advising Mr. Rogers that Mr. O'Reilly's commissions were to be reduced, effective January 1, 1949, to 1½%, (Exhibit A-10, Tr. 278), which information was confirmed verbally to Rogers by O'Reilly (Tr. 277). Mr. Roberg further testified that there was no mention in the conversation of a period of time for which the reduction was to be effective. (Tr. 217).

All testimony and evidence in the record relating to the conversation is without dispute on the following points:

1. Reference was made to the unsatisfactory state of the appellant's board division;

2. O'Reilly said he would voluntarily reduce his commission from 3% to 1½%; and

3. On behalf of appellant, Roberg agreed to such reduction.

Thus, it will be seen that the only evidence in the

record establishes without dispute what took place between the parties.

The only dispute which might be said to have existed with reference to the conversation referred to the period during which the reduction was to be effective. O'Reilly claimed that the reduction was to be "until the operations became more profitable" (Tr. 97). Roberg denied that there had been any mention "as to whether the reduction was to be for any period of time." (Tr. 217). This dispute, if it was one, would, however, go only to the question of the period to be covered by the modification, and has no bearing on the question of whether or not there was a modification.

The evidence is undisputed and without conflict on this phase of the case. In that state of the evidence there was no issue of fact and no determination of fact, or room for such determination, by the trial court.

The Issue Was One of Law and Not of Fact.

The trial court held there was no modification or no valid agreement which modified the original agreement. (Findings of Fact Nos. XIII, XIV; Conclusions of Law Nos. II, IV, Tr. 41-42).

The true nature of the holding is not controlled by whether it be labelled a "Finding of Fact" or a "Conclusion of Law". That the trial court embodied its holding on the question of modification in its

Findings, as well as its Conclusions, does not, of course, determine the scope and function of the Court's review. In both of the cases cited, the Court reversed the judgment below, where it reached a different conclusion, although the trial court's conclusion was embodied in its findings, without regard to the "clearly erroneous" rule.

Essentially, the question before the trial court was whether there had been an *effective* modification. This could be either a question of law or of fact, dependent upon the issues presented. The evidence being undisputed, the only issue was the legal effect of the transactions between the parties. This would necessarily be a legal conclusion, freely reviewable by the appellate court.

The Trial Court Determined This Issue As An Issue Of Law.

The Findings of Fact and Conclusion of Law clearly show that the trial court's holding related to the *validity* of the modification.

The trial court touched on the issue of modification in three Findings of Fact, Nos. X, XIII and XIV, and in two Conclusions of Law, Nos. II and IV.

The sole evidentiary findnig relating to modification is contained in Finding of Fact No. X (Tr. 38-39) which recites as follows:

> "That in December, 1948 or January, 1949, plaintiff, without consideration or promise of consideration, advised defendant Puget Sound

> Pulp & Timber Co. that he would temporarily reduce his commission to 1½% of net sales of the Paperboard Division of defendant corporation [and would in effect, postpone collection of the remainder thereof.] * * * That said reduction in plaintiff's commission from 3% to 1½% of the net sales of said Division was without consideration or promise of consideration."

(That the portion appearing in brackets was a legal conclusion without factual support in the record was recognized by this Court in its opinion in the paragraph beginning on page 4 and ending on page 5.)

Findings XIII and XIV are clearly non-evidentiary and conclusory in nature, and cannot be determinations of issues of fact, because the facts are undisputed.

The exact basis for the trial court's disposition of the issue of modification is clearly disclosed in its Conclusion of Law No. II (Tr. 42):

> "That no *consideration* was promised or tendered by defendant, Puget Sound Pulp & Timber Co., nor received by plaintiff for the reduction of plaintiff's commission from 3% to 1½% of net sales of the Paperboard Division of defendant corporation, nor were there any *valid* agreements of any kind or nature entered into between plaintiff and defendant, Puget Sound Pulp & Timber Co., a corporation, which in any way vitiated or modified, or in any way changed or altered the duties and obligations of said defendant, Puget Sound Pulp & Timber Co., to the plaintiff herein." (Emphasis supplied)

Consideration of the Findings and Conclusions relating to modification as a whole makes it clear that

the trial court was holding that there was no *valid* modification, because it regarded *consideration* as required for the valid and binding modification of an executory or partially executory agreement. That is why the trial court repeatedly emphasized lack of consideration, a matter that would be relevant only to a determination of the legal conclusion to be drawn from the transactions between the parties.

This is the precise question raised by appellant in its Specification of Error No. 2 (Appellant's Brief 12-13) and in argument thereon. Treating the trial court's determination that there was no *valid* modification as a determination of fact, this Court's opinion did not consider this question. Under the Court's holdings as to the scope of its review of trial court determinations based on undisputed evidence, in the *Brown* and *Stevenot* cases, it should have done so. Appellant therefore submits that this Court should determine for itself the issue of law arising from the undisputed facts, and that the case should be reheard on that question.

Respectfully submitted,

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